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SUPREME COURT, U.S.

No. 83-175

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CATHOLIC HOME BUREAU,

Petitioner,

-against-

ANNA DOE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Cases and Authorities ii

STATEMENT OF FACTS 1

REASONS WHY THE WRIT SHOULD BE DENIED. 7

I. THE EVIDENCE WAS SUFFICIENT TO GO TO THE JURY 7

II. THE LAW OF THE CASE DOCTRINE DOES NOT MERIT REVIEW IN THIS CASE. 12

A. Parratt v. Taylor 13

B. Youngberg v. Romeo. 15

CONCLUSION 19

APPENDIX: Transcript of Charge Conference, Second Trial. A-1

TABLE OF CASES AND AUTHORITIES

Bartels v. County of Westchester, 76 A.D.2d 517, 429 N.Y.S.2d 906 (2nd Dept. 1980) 16

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). 16

Doe v. New York City Department of Social Services, 649 F.2d 134 (2d Cir. 1981) ("Doe I") 3, 4, 8, 11, 12,

Doe v. New York City Department of Social Services, 709 F.2d 782 (2d Cir. 1983) ("Doe II"). 1, 2, 3, 4, 5, 6, 8, 9, 10, 12, 14

Estelle v. Gamble, 429 U.S. 97 (1976) 12, 16

Holmes v. Goldin, 615 F.2d 83 (2d Cir. 1980). 12

Ingraham v. Wright, 430 U.S. 651 (1977) 14

Monroe v. Pape, 365 U.S. 167 (1961) 15

Owens v. Haas, 601 F.2d 1242 (2d Cir. 1979), cert. den. 444 U.S. 980 (1979). 12

Parratt v. Taylor, 451 U.S. 527 (1981). 12, 13, 14

Patsy v. Board of Regents of State of Florida, ___ U.S. ___, 102 S.Ct. 2557 (1982). 15

Simblest v. Maynard, 427 F.2d 1 (2d Cir. 1970). 9

Smith v. Wade, ___ U.S. ___, 103 S.Ct. 1625 (1983). . . 15

Stanley v. Illinois, 405 U.S. 645 (1972). 14

Tennant v. Peoria & Pekin Union Railway Co., 321 U.S. 29 (1944) 11

Turpin v. Mailet, 619 F.2d 196 (2d Cir. 1980) 12

Youngberg v. Romeo, 457 U.S. 307 (1982) 10, 12, 13, 15, 16, 17, 18

42 U.S.C. §1983 15

N.Y. Fam. Ct. Act §1012(f)(i)(A) 2, 10

N.Y. Soc. Serv. Law §413 . . . . . 3, 17

N.Y. Soc. Serv. Law §424(6). 17

18 N.Y.C.R.R. §443.1 . . . . . 4, 10

STATEMENT OF FACTS

Respondent ANNA DOE, born in April 1961, was placed in foster care in the legal custody of the New York City Commissioner of Welfare (now known as Commissioner of Social Services) when she was two years old. The Commissioner arranged for the petitioner Catholic Home Bureau to care for Anna and her sister Evelyn.* The Bureau placed both girls in the home of Frank and Josephine Senerchia, whom they had investigated and certified on September 30, 1963. In 1965, petitioner placed Evelyn (Lynn) and Annette Wong with the Senerchias. Doe v. New York City Department of Social Services, 709 F.2d 782, 783 (2d Cir. 1983)("Doe II").

Starting when Anna was about ten or eleven years of age, she was regularly and frequently beaten, physically assaulted, and sexually abused by her foster father, Frank Senerchia. He beat her with his hands and belt all over her body; he threw her down the stairs; on one occasion he stabbed her with a hunting knife. He confined her to her room for days at a time, not even allowing her out for meals; he forced her to have intercourse and oral sexual relations with him. Doe II at 783. Mr. Senerchia threatened to institutionalize Anna if she told anyone what he

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* The agreement between the Commssioner and the petitioner provided, inter alia, that the agency:

1) supervise Anna's placement and see that she receive proper care in the foster home; 2) investigate the foster parents annually and certify them as foster parents for one year at a time; 3) report to the Commissioner, first annually and then semi-annually, on all aspects of Anna's care and development; 4) inform the Commissioner of all important events in Anna's life as they occurred; 5) comply with all requirements of federal, state and local law with the policies and directives of the Department.

was doing to her. Once she tried to leave the foster home and was found by him and brutally beaten.

Although the agency claimed that they had no knowledge of the abuse prior to August, 1977, their professed ignorance was the result of a deliberate failure to recognize the facts, and of a long-standing pattern of shockingly inadequate supervision of the foster home.

In early January, 1975, the agency's executive director learned from a priest that Mr. Senerchia had taken Anna out of school, alleging that she was engaging in group sexual activity there. On January 7, 1975, Catherine Crowe, supervisor of the Staten Island office, called Mr. Senerchia, who repeated the allegations, detailing Anna's alleged frequent sexual activity during school hours in empty classrooms, hallways, the gym, and the cafeteria, and including sexual intercourse as early as the first grade. Doe II at 784. Senerchia insisted that the agency not contact the school or his wife about Anna's sexual activity. Despite Crowe's not believing all of Senerchia's charges, and her knowing him to be manipulative and dishonest, the petitioner acquiesced in keeping Anna out of school while a special class placement was being sought, though this violated New York law. N.Y. Family Court Act §1012(f)(i)(A).

A special class required a psychiatric evaluation and for this reason petitioner had Anna seen by Dr. Lois Bellinger de Alvarado, a psychiatrist on its staff, on March 19, 1975. Dr. de Alvarado, an expert on sexual abuse, concluded that Anna was

sexually involved with her foster father and should be removed from the home immediately. She told Crowe and Joseph Galano, petitioner's coordinator of Special Services, of her conclusions that same day, but they took no action for three weeks. Doe II at 785.

On April 10, 1975, Galano, Crowe, Ann Moroney, petitioner's director of social work*, and the caseworker Joanne Klages met to discuss respondent. They concluded that "Anna's involvement with the foster father should be further investigated." Doe II at 785.

New York, like every other state, has mandatory child abuse reporting laws, N.Y. Social Services Law Sections 413 et seq, which require foster care agencies, among others, to report all suspected child abuse to the child abuse Registry of the Department of Social Services (DSS) which employs trained staff to investigate these reports. See Doe v. New York City Department of Social Services, 649 F.2d 134, 145 n.8 (2d Cir. 1981)("Doe I"). DSS had a special unit which investigates all child abuse in foster care; foster care agencies do not do their own investigations. Moreover, on March 5, 1975, Deputy Commissioner of DSS Carol Parry sent a memorandum to all foster care agencies,

* Una McCormack, the executive director, had designated Moroney, her immediate subordinate, to attend the meeting as her representative.

including petitioner, reminding them of their obligation to report all cases of suspected child abuse and to err on the side of overreporting. Doe I at 147 n. 13.

Petitioner did not report Dr. de Alvarado's conclusions to DSS, so that the matter could be "further investigated." Instead Galano directed Dr. de Alvarado to revise her report, eliminating all references to sexual abuse (allegedly so that Anna would more readily be accepted into a special school), and ordered that the original report not be copied or revealed to anyone outside the agency. Doe II at 785.

On April 14, 1975, the truant officer called Crowe, and, after learning why respondent was not in school, said he thought Senerchia's stories of orgies were unfounded. On April 16, 1975, the principal informed petitioner that he had checked respondent's records and found that respondent had not missed any of her classes. He also said the school had no empty classrooms or storerooms. Doe II at 785.

Petitioner again took no action until May 12, 1975, when the caseworker made the first visit to the foster home since December 1974.* Mr. Senerchia gave a version of Anna's sexual

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* New York law requires foster care agencies to visit foster homes once every three months. 18 New York Compilation of Codes, Rules, and Regulations ("N.Y.C.R.R.") §443.1.

activity which the worker recognized was greatly different from the previous version. Doe II at 785. Despite the inconsistencies, petitioner did not report Dr. de Alvarado's suspicions to the Central Registry.

In June, 1975, petitioner submitted its annual report on respondent to DSS. Neither on this report nor at any time did petitioner inform DSS of respondent's six month absence from school, her supposed sexual acting out, the problems in the foster home, or Dr. de Alvarado's reports and recommendations, even though it was required to do so.* Doe II at 786.

In the fall of 1976, Mr. Senerchia made allegations of sexual activities against Evelyn Wong which the petitioner felt were amazingly similar to those made against respondent. Stella Gambino, then supervisor, felt that there had to be pathology in the family, and that Mr. Senerchia did not care for petitioner with the quality of a parent. Gambino remembered Dr. De Alvarado's conclusions, but no report was filed with the Central Registry.

In March, 1977, as recommended by Dr. de Alvarado two years earlier, the Senerchias and respondent were interviewed by Dr. Emil Piana, the agency's psychiatrist. Dr. Piana had only a two-page summary of the case. Dr. Piana acknowledged that he did not ask teen-aged girls about sexual relations with their foster fathers because the girls might complain and he could lose his job. As a result, Piana obtained no information about sexual

* When respondent returned to school in the fall, it was to a parochial school, not to the special class petitioner claimed to have been seeking.

abuse. Doe II at 786.

In July, 1977, Mr. Senerchia told petitioner that he planned to divorce his wife and marry his pregnant, seventeen-year-old girlfriend. In August, 1977, Mrs. Senerchia told petitioner she had found her husband in bed with respondent. Petitioner than reported the abuse to the Central Registry. Doe II at 786.

DSS's investigation confirmed that respondent had been repeatedly and severely abused -- both physically and sexually -- by Mr. Senerchia. Doe II at 783.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE EVIDENCE WAS SUFFICIENT TO GO TO THE JURY

Contrary to its assertion, petitioner's second issue is not one of widespread significance. The question of whether the evidence in this particular case was sufficient to go to the jury is necessarily a question which affects only the litigants in this case. It is only a question of fact.

This case concerns an extraordinary misuse of governmental authority, over a prolonged period of time, by an organization which was established to care for and protect children in the custody of the state. Because of the deliberate indifference of agency officials and staff, one of the children whom they were supposed to protect was left unprotected and was seriously harmed. The extraordinary behavior of petitioner, shocking to the conscience, is, fortunately, unusual. Contrary to petitioner's assertion that the Second Circuit's holding will frighten foster care workers and cause a major disruption of the New York foster care system, petitioner's extraordianry and shocking behavior is sufficiently rare that a denial of certiorari will allow the average foster care official to continue to provide services to children in state custody without fear of federal liability.

The Second Circuit has twice decided that the factual issues in the instant case should be decided by the jury. In the first appeal it said:

> Whether the Catholic Home Bureau's omissions were the product of deliberate indifference and proximately caused any portion of Anna's

> abuse were questions of fact to be resolved by the jury.
>
> Doe I at 149.

In the second appeal it ruled similarly:

> There was sufficient evidence for the liability issue to be presented to the jury, and the jury made the decision.
>
> Doe II at 792.

The Second Circuit properly found that the following uncontroverted actions or omissions by the petitioner's employees were sufficient evidence of deliberate indifference for the case to go to the jury and for the jury to find in favor of respondent:

1. the failure to report suspected child abuse in March, 1975, after being informed of Dr. de Alvarado's conclusion;

2. the failure to investigate after concluding, in April, 1975, that the matter should be investigated;

3. the failure to verify the foster father's allegations of respondent's sexual misbehavior in school with the school;

4. the failure to take action after school authorities refuted Mr. Senerchia's charges;

5. allowing respondent to remian out of school for an entire semester;

6. failing to make any home visits between December, 1974, and May, 1975;

7. failing to report respondent's school absence, alleged sexual misbehavior, or Dr. de Alvarado's suspicion of abuse in the June, 1975, report to the Department of Social Services;

8. failing to take action when Mr. Senerchia reported

markedly similar sexual acting out by respondent's foster sister; and

9. failing to provide Dr. Piana with adequate information, or the failure of Dr. Piana, in light of the information given, to question respondent concerning sexual abuse in March, 1977. Doe II at 791-792.

Petitioner's factual argument that its provision of services to respondent showed beyond doubt that it was not deliberately indifferent to the risk of abuse to respondent (petition, pp. 25-26) was presented to the jury and properly rejected. It was then presented to and properly rejected by the Second Circuit. Doe II at 791.

In the first place the petitioner's list of alleged activities during 1975 (petition, pp. 23-25) is highly misleading and occasionally blatantly incorrect, and consequently not proper in a review of judgment n.o.v. Even if it had any probative value, that evidence, like all the other evidence in the case, must be viewed in the light most favorable to the non-movant. Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970). Viewed thus, petitioner had nothing to do with respondent's eye glass prescription, her physical examination, her examination by the Board of Education's psychiatrist Dr. John Davis. Moreover, petitioner made no arrangements for respondent to attend summer school in 1975.*

The charts, and petitioner's summary (petition, pp. 23-25) of phone contacts with the foster parents, the Board of Education, St. Vincent's clinic, respondent's school, and the truant officer,

* The charts appended to the petition (A-110-115) are documents prepared for trial by petitioner's attorney. They were admitted into evidence by the District Judge with the warning that the jury were to disregard any information in the charts which was not confirmed by other evidence.

neglect to mention that many, if not most, of these calls were made to the petitioner, not by thepetitioner. The service performed by the petitioner consisted solely of answer the telephone.

A jury could reasonably find that the petitioner was responsive to respondent's needs for speech and hearing tests but deliberately indifferent to the risk that respondent was being physically and sexually abused, and participated in a cover-up to avoid responsibility for the abuse. As this Court found in Youngberg v. Romeo, 457 U.S. 307 (1982), the defendant provided Nicholas Romeo with a number of services, including training in several basic self-care skills, Id. at 311, medical treatment, Id. at 310, and protection from harm while in the infirmary. Despite these services, the hospital could be held liable for violating his constitutional rights.

Even the services petitioner did provide to respondent were inadequate, and do not support the claim that they demonstrated "intense concern." Although petitioner claimed to be interested in respondent's education, it allowed a child with severe educational problems to remain out of school for six months, without reporting this form of child neglect to the authorities. N.Y. Fam. Ct. Act §1012(f)(i)(A). In the fall they agreed to send respondent to a parochial school instead of the special class they had claimed to be seeking. Doe II at 786.

18 N.Y.C.R.R. §443.1 required petitioner to visit and inspect the foster home at least once every three months, but no one visited the home between December, 1974, and May, 1975.*

* Contrary to the allegation that a social worker interviewed respondent at the foster home on March 19, 1975, the caseworker merely brought respondent to and from Dr. de Alvarado's office that day.

When petitioner had respondent's speech and hearing evaluated in 1975, it had delayed three years to do so. Petitioner's psychiatrist had recommended these evaluations in 1972.

Petitioner raised before the jury all the claims it has made to this Court. The jury drew an inference of deliberate indifference from the totality of the evidence. It is not the function of appellate courts to draw a contrary inference in the jury's stead. Tennant v. Peoria & Pekin Union Railway Co., 321 U.S. 29, 35 (1944).*

* Petitioner's claim that it would not have discovered the abuse if it had followed its constitutional duties to respondent (petition, p. 22), the argument that there was no proximate cause, is not properly before this Court. Petitioner requested, and the district judge granted, judgment n.o.v. solely on the ground of deliberate indifference (petition, A-62), accepting the jury's resolution of proximate cause. As the Second Circuit had previously held, "In this case the causal link between the agency's alleged failure to supervise and the continuation of Anna's abuse is clear." Doe I at 144.

Contrary to petitioner's statement that the foster mother was unaware of the abuse (petition, p. 22), she stated, in writing, that "on very numerous occasions," she observed the foster father "punching, pulling [Anna's] hair, banging [Anna's] head against the wall, throwing [Anna] to the ground and kicking [Anna]."

II. THE LAW OF THE CASE DOCTRINE DOES NOT MERIT REVIEW IN THIS CASE.

Though petitioner argues that the Second Circuit's misapplication of the law of the case doctrine merits review by this Court, the Second Circuit did not base its decision solely on that doctrine. It held that the law of the case required that the factual issues go to the jury, but also that on the evidence presented, the trial court should have let the jury decide liability. Doe II at 790. Even if it might be argued that the Second Circuit was wrong in applying law of the case, the court's alternative ground for reversing, the evidentiary ground, remains.*

Petitioner's claim that the law of the case is inapplicable because of this Court's decisions in Parratt v. Taylor, 451 U.S. 527 (1981) and Youngberg v. Romeo, 457 U.S. 307 (1982) is in fact a claim that the Second Circuit applied the wrong standard of liability, deliberate indifference, in a civil rights damage action. Petitioner has not preserved that argument for review.

This case has been twice tried and twice appealed under the standard of deliberate indifference, the standard then in effect in this Court, Estelle v. Gamble, 429 U.S. 97 (1976), and in the Second Circuit, Turpin v. Mailet, 619 F.2d 196 (2d Cir. 1980); Holmes v. Goldin, 615 F.2d 83 (2d Cir. 1980); Owens v. Haas, 601 F.2d 1242 (2d Cir. 1979), cert. den. 444 U.S. 980 (1979). Petitioner did not contest that standard. On the contrary, petitioner relied extensively on Estelle v. Gamble, supra, in its brief to the Second Circuit in Doe I. If, as petitioner claims, (Petition, p. 13) the Second Circuit extended the deliberate indifference standard in Doe I, it did so without objection by petitioner.

At the second trial, petitioner specifically requested that

* Petitioner does not argue that the doctrine of law of the case is incorrect, only that the Second Circuit misapplied the doctrine in the instant case. This question presents no important issues of general significance.

the jury be charged according to the deliberate indifference standard; petitioner objected only to the way in which the District Judge proposed to explain deliberate indifference to the jury. (Petitioner did not submit written requests to charge the jury, but instead presented its requested instructions orally at a conference with the judge. The transcript of that conference is included as the Appendix to this Brief.) Petitioner did not request any jury instructions in connection with Parratt v. Taylor, 451 U.S. 527 (1981), though that case had been decided prior to the second Doe trial. Petitioner also did not request that the jury be charged, as this Court held in Youngberg v. Romeo, 457 U.S. 307 (1982), that decisions of its professionals were presumptively valid, though it now claims the jury should have been so instructed. (Petitioner, p. 16).*

Even if petitioner had preserved its claims based upon Parratt, supra, and Youngberg, supra, its reliance on those cases does not merit review by this Court, because neither decision affects the outcome of the instant case.

A. Parratt v. Taylor

Parratt is not applicable because it involved procedural due process rights of individuals deprived of property; this Court found that the state's accidental loss of a prisoner's hobby kit was something which could not be foreseen and for which there were no procedures a state could reasonably adopt.

The instant case did not involve an accident, and did not involve simple negligence. Rather, it involved an "affirmative

* The fact that this Court had not yet issued its decision in Youngberg when the instant case was tried for the second time in no way precluded petitioner from arguing the standard previously explicated by Judge Seitz in the Third Circuit opinion in Youngberg and subsequently adopted by this Court.

abuse" of state power, Parratt v. Taylor, 451 U.S. 527, 549 (1981), (Powell, J., concurring), over a prolonged period of time, by a public agency established to protect dependent, abused, and neglected children in state custody. The deliberate actions here were shocking to the conscience, not the mere negligence involved in Parratt, and the jury and Second Circuit so found.

The instant case also does not involve the procedural right to notice and an opportunity to be heard, the right involved in Parratt, but instead the substantive right to be free from harm. While in Ingraham v. Wright, 430 U.S. 651 (1977), this Court ruled that if a state provided proper procedures, it could legally permit its school teachers to strike children, it is inconceivable to argue that if a state provides notice and an opportunity to be heard, it may legally permit public agencies to condone rape and stabbing of foster children.

Parratt involved a wrongful deprivation of property, which could be fully compensated. Here respondent was wrongfully deprived of liberty, a deprivation that could never fully be made whole, even if the wrong was subsequently undone. Stanley v. Illinois, 405 U.S. 645 (1972).

As petitioner claims (petition, p. 19), respondent does not argue that New York's laws and rules for the protection of foster children are inadequate, precisely because the petitioner did not follow those rules; and consequently the adequacy of the rules was irrelevant. Moreover, as the Second Circuit ruled, Doe II at 787, the foster care agency's failure to follow the rules was evidence of a mental state of deliberate indifference, since the petitioner had actual knowledge of the actions it was supposed to take and failed to take those actions.

The fact that petitioner may have violated the state laws and rules as well as the United States Constitution does not eliminate respondent's right to seek redress in federal court under 42 U.S.C. §1983. Violations of constitutional rights which coincidentally are also violations of state law may be remedied under 42 U.S.C. §1983. Injured persons are not required to exhaust state remedies before bringing actions under 42 U.S.C. §1983. Patsy v. Board of Regents of State of Florida, ___ U.S. ___, 102 S.Ct. 2557 (1982); Monroe v. Pape, 365 U.S. 167, 183 (1961).

Petitioner incorrectly asserts that respondent wants to create a constitutional tort, which this Court has repeatedly admonished against creating. (Petition, pp. 7, 19). On the contrary, Congress, not respondent, created a "species of tort liability in favor of persons deprived of federally secured rights," when it passed the Civil Rights Act of 1871, 42 U.S.C. §1983. Smith v. Wade, ___ U.S. ___, ___, 103 S.Ct. 1625, 1628 (1983); see also Monroe v. Pape, 365 U.S. 167 (1961). Respondent has sought only to enforce that right.

B. Youngberg v. Romeo

Petitioner's claim that Youngberg made the standard of liability in civil rights damage actions stricter than the previous standard of deliberate indifference (petition, p. 16), and its implied claim that this standard should be applied retroactively to the instant case, are both insufficient to merit review by this Court.*

* Petitioner's claim that if Youngberg is not applied, social workers will take children out of foster homes and put them into orphanages in order to escape liability, and will themselves leave foster care agencies and work in mental institutions instead (petition, p. 8), is mere unsupported speculation, not deserving of serious consideration.

Youngberg did not make the standard of liability stricter; it liberalized the standard by removing the subjective element of it. This court explicitly found that the old standard, articulated in Estelle v. Gamble, 429 U.S. 97 (1976), was too stringent for innocent persons whose constitutional rights had been violated.

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) identifies three factors to be considered in deciding whether a decision should be applied retroactively (aside from questions as to preservation of issues). Petitioner has not explained why, under those factors, the Youngberg rule should be applied retroactively in the instant matter. Since this case has involved two protracted jury trials and two appeals under the standard of deliberate indifference, it would be inappropriate to change the standard of liability in this Court.

The issue of whether the Youngberg standard of substantial departure from accepted professional judgment should be applied retroactively to New York foster care organizations and staff is not one of general significance, nor is it even one of major concern to foster care employees and officials in the State of New York. Subsequent to the commencement of the instant lawsuit, New York state held that the standard of liability for foster care providers is simple negligence. Bartels v. County of Westchester, 76 A.D.2d 517, 429 N.Y.S.2d 906 (2nd Dept. 1980). Since New York has set a lower standard of proof in state court, and correspondingly higher standard of duty, than either the Youngberg or Estelle standard, the issue of which federal standard should be applied is not of interest to foster care officials, who already know how they must behave.

If Youngberg is applied to this case, it does not affect the jury's verdict. This is not a case involving "the presumptive validity of professional judgment." (Petition, pp. 16-17). Instead, it involves a steadfast and extended refusal, by an entity whose function was to protect children in state custody, to comply with nondiscretionary legal duties and to act on any judgment, including its own. Pursuant to state law and to its contract with the New York City Department of Social Services, petitioner was not supposed to exercise professional judgment in cases of suspected child abuse. It was simply supposed to report them, and permit the trained investigators of DSS to conduct the investigation and use their professional judgment to determine whether the child was being endangered. N.Y. Soc. Serv. Law §§413, 424(6).

In April, 1975, the petitioner exercised its professional judgment and concluded that "Mr. Senerchia's involvement with Anna should be further evaluated." This judgment required the agency to report the situation to the Department of Social Services so that its trained investigators could act. Petitioner did not do so. At a minimum, the agency was required to follow up its judgment by conducting its own investigation, but petitioner did no investigation whatsoever. Even if that judgment is considered presumptively valid, petitioner's subsequent failure to take action violated not only accepted professional judgment but petitioner's own judgment.

The record shows clearly that two of petitioner's three clinicial professionals who evaluated respondent -- Drs. Lewis and Piana -- did not exercise any professional judgment on the question

of child abuse; they did not even consider it.* The only professional who did consider the question was Dr. de Alvarado, who, after evaluating respondent, concluded in her professional judgment that there was a very strong likelihood that respondent was being sexually abused. This judgment, made by a professional, was presumptively valid. Moreover, Dr. Helen Rodriquez-Trias, respondent's expert on child sexual abuse, testified that the accepted professional standard for clinicians dealing with possible sexual abuse was to have a complete history of the child. The only professional to adhere to this standard was Dr. de Alvarado. Dr. Lewis had no history; she hadn't even read the case record which had been given her. Dr. Piana was given only a two-page psychosocial summary on respondent, providing an incomplete history on the child.

Petitioner is attempting to use Youngberg v. Romeo, supra, as a substitute for a claim of good faith immunity, even though petitioner did not request that either trial judge instruct the jury that it was entitled to a defense of good faith immunity. Nor did petitioner present any evidence of acting in good faith. After two trials and two appeals in which petitioner failed to raise the issue of its acting in good faith, or exercising its professional judgment, it is inappropriate to raise that issue for the first time in this Court.

* Dr. Piana stated that he did not ask questions about sexual abuse because foster parents or children might complain about him and he might lose his job. Dr. Lewis did not deal with the issue at all.

CONCLUSION

For all the foregoing reasons, respondent respectfully requests that this Court deny the petition for a writ of certiorari.

Dated: September 7, 1983

Respectfully submitted,

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APPENDIX

* * *

THE COURT: The record may indicate that the parties have each made whatever motions the rules permit at this time for directed verdict or whatever and that

all those motions are either denied or reserved. The court will let the matter go to the jury.

In my jury instructions, I expect to point out to them their duty of impartiality, the freedom from sympathy or prejudice and that the parties are equals; that they decide the facts.

I will discuss credibility with them in the traditional fashion. That questions aren't evidence. The mere fact that a suit is brought doesn't mean anything. I will tell them if they find a particular witness has testified falsely in any one material part of his or her testimony they may look with distrust upon any other evidence given by that witness.

We have not really had any impeachment by deposition in this trial that needs to be discussed with them.

MR. MARTINE: I think not.

MR. LANSNER: I think of Dr. Piana.

THE COURT: You want it?

MR. LANSNER: I would ask for it.

THE COURT: All right.

MR. MARTINE: May I note for the record my objection to it at this time.

THE COURT: We generally give that instruction

but it just prolongs the discussion. It is a proper use of depositions and I usually tell them that unless I get agreement not to. They may disregard an interested witness even though it is not otherwise impeaching or contradictory. They are not bound by the experts. Most of that is so standard I'll explain to them clearly that the lawyers are just doing their job and I'm just doing mine and I have no opinion as to the truthfulness of any witness or as to the merits of the case. It is entirely up to them.

I will explain the preponderance of the credible evidence and I will tell them that it is not a criminal case so the proof beyond a reasonable doubt that they hear on television does not apply.

They must follow my instructions as to the law.

I will tell them that their approach is divided into two parts. The first part is the issue of liability and the second part is the issue of damages. They do their deliberating in two separate stages. If they find liability, then and only then do they enter into the question of damages.

MR. MARTINE: May I ask in that regard and with regard to discussing damages that your charge must include that. Merely because you are discussing it, it

doesn't mean one way or the other.

THE COURT: That's required and it will be included.

I will instruct them that she has to prove that the defendant is liable to her for damages on the theory upon which this action is based, namely, a deprivation of her civil rights. She must also prove by a preponderance of the credible evidence the fact that she was damaged, caused by or as a result of such a violation and must prove with a reasonable certainty the amount of her damages.

The jury may not speculate as to any fact issues in the case and only consider the evidence submitted at trial.

The Senerchias are not in the case. The Catholic Home Bureau is not responsible for the Senerchia family. It is only legally responsible for the actions or failures to act on its own case workers, physicians, psychologists and psychiatrists. The Senerchias were not agents of the Catholic Home Bureau and this case is not founded on their misconduct. Rather, it is claimed that the Catholic Home Bureau through its own employees or supervisors acted or failed to act in an manner which allegedly violated her civil rights.

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No. 83-175

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CATHOLIC HOME BUREAU,

Petitioner,

-against-

ANNA DOE,

Respondent.

MOTION TO PROCEED
IN FORMA PAUPERIS

The respondent ANNA DOE asks leave to proceed in forma pauperis, pursuant to Rule 46 of the Rules of this Court.

Leave to proceed without paying costs was granted in the United States Court of Appeals for the Second Circuit, by the United States District Judge.

The respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

September 6, 1983

LOUISE GRUNER GANS
Community Action for Legal Services
335 Broadway
New York, New York 10013
Tel. (212) 431-7200
Counsel for Petitioner

No. 83-175

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CATHOLIC HOME BUREAU,

Petitioner,

-against-

ANNA DOE,

Respondent.

AFFIDAVIT IN SUPPORT OF THE MOTION TO PROCEED IN FORMA PAUPERIS

I, ANNA FARIA, being first duly sworn, depose and say that I am the respondent in the above-entitled case, which I am defending under the name ANNA DOE, that in support of my motion to proceed in this Court without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that I sought and was granted leave to proceed in forma pauperis in the United States Court of Appeals for the Second Circuit;

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of defending the appeal are true.

1. I am not presently employed. I was last employed in October, 1982, and my monthly wages were approximately $540.00.

2. Within the past twelve months I have not received any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, or dividends. Prior to March, 1983, I was residing with my husband, and being supported by him. Since then we have separated, and my husband has been ordered by the Supreme Court of the State of New York to pay child support in the sum of $75.00 per week. My husband has not always complied with the court order, and I have had to borrow money from friends when he has not paid support.

3. I own no cash and no checking or savings account.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property, excluding ordinary household furnishings and clothing.

5. My children Andrew Faria and Michael Faria are dependent upon me for support.

I understand that a false statement or asnwer to any questions in this affidavit will subject me to penalties for perjury.

Anna Faria
ANNA FARIA

Sworn to before me this
2nd day of September, 1983.

David Lansner
NOTARY PUBLIC

DAVID J. LANSNER
Notary Public, State of New York
No. 24-7428570
Qualified in Kings County
Commission Expires March 30, 1984

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

CAROLYN A. KUBITSCHEK, being duly sworn, deposes and says:

1. I am over the age of eighteen years, a resident of the City and State of New York, and not a party to this matter.

2. On September 8, 1983, I served the within motion to proceed in forma pauperis on Frederick J. Magovern, Esq. attorney for petitioner herein, at 120 Broadway, New York, New York 10271, the address designated by said attorney for that purpose by depositing a true copy thereof, enclosed in a properly addressed, postage paid envelope, in an official depository of the United States postal service in the City of New York.

Carolyn A. Kubitschek
CAROLYN A. KUBITSCHEK

Sworn to before me this
8th day of September, 1983.

Dana M. Mingo
NOTARY PUBLIC

DANA M. MINGO
Notary Public, State of New York
No. 31-7964936
Qualified in New York County
Commission Expires March 30, 19[illegible]

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

CAROLYN A. KUBITSCHEK, being duly sworn, deposes and says:

1. I am over the age of eighteen years a resident of the City and State of New York, and not a party to this matter.

2. On September 8, 1983, I served the within respondent's brief on Frederick J. Magovern, Esq., attorney for petitioner herein, at 120 Broadway, New York, New York, 10271, the address designated by said attorney for that purpose, by depositing a true copy thereof, enclosed in a properly addressed, postage paid envelope, in an official depository of the United States Postal Service in the City of New York.

Carolyn A. Kubitschek
CAROLYN A. KUBITSCHEK

Sworn to before me this
8th day of September, 1983.

Dana M. Magovern
NOTARY PUBLIC

DANA M. MAGOVERN
Notary Public, State of New York
No. 31-7964900
Qualified in New York County
Commission Expires March 30, 1984

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

LOUISE GRUNER GANS, being duly sworn, deposes and says:

1. I am an attorney admitted to practice in this Court.

2. I make this affidavit pursuant to Rule 28.2 of the Rules of this Court.

3. To my knowledge, respondent's brief in opposition to the petition for certiorari was mailed by Carolyn A. Kubitschek to Frederick J. Magovern, Esq., attorney for petitione, at his office at 120 Broadway, New York, New York, on Spetember 8, 1983.

4. To my knowledge, the service of the brief was within the time permitted by the Rules of this Court.

LOUISE GRUNER GANS

Sworn to before me this
8th day of September, 1983.

NOTARY PUBLIC

DANA M. MINGO
Notary Public, State of New York
No. 31-7984736
Qualified in New York County
Commission Expires March 30, 1984